

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LENNOX SMITH-STEWART,	:	CIVIL NO. 3:08-CV-02283
Plaintiff	:	(Judge Caputo)
v.	:	(Magistrate Judge Smyser)
B.A. BLEDSOE, Warden and	:	
DR. A. BUSSANICH, Clinical	:	
Director,	:	
Defendants	:	

REPORT AND RECOMMENDATION

The plaintiff, a federal prisoner, commenced this action by filing a complaint on December 22, 2008.

On May 7, 2009, the defendants filed a motion to dismiss or, in the alternative, motion for summary judgment. Also on May 7, 2009, the defendants filed a statement of material facts and documents in support of their motion. On May 19, 2009, the defendants filed a brief in support of their motion. The plaintiff did not file a brief in opposition to the motion as required by Local Rule 7.6, Rules of Court, M.D. Pa.

By an Order dated June 10, 2009, the plaintiff was ordered to file a brief in opposition the motion to dismiss or for summary judgment on or before June 29, 2009. The Order of June 10th warned the plaintiff that if he fails to file a brief in opposition within this time it may be recommended that this action be dismissed pursuant to Fed.R.Civ.P. 41(b), by application of the factors in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

The plaintiff has not filed a brief in opposition to the motion to dismiss or for summary judgment.

Federal Rule of Civil Procedure 41(b) allows for the dismissal of an action where the plaintiff fails to prosecute or fails to comply with rules or orders of the court. The plaintiff has failed to prosecute this action and has failed to obey the court's Order of June 10, 2009, and Local Rule 7.6, which requires the filing of an opposition brief. The case should be dismissed pursuant to Fed.R.Civ.P. 41(b).

In *Stackhouse v. Mazurkiewicz*, 951 F.2d 29 (3d Cir. 1991), the court reversed the district court's dismissal for the *pro se* plaintiff's failure to file a brief in accordance

with a local rule of court. The court stated that failure to obey the local rule should not form the basis for dismissal without an analysis of the merits of the case. The court noted that dismissal was not to be ruled out if the party was represented by an attorney and in fact did not oppose the motion. "Nor do we suggest that if a party fails to comply with the rule after a specific direction to comply from the court, the rule cannot be invoked. Thus, our holding is not broad." 951 F.2d at 30.

In this case, the plaintiff was specifically directed to file a brief in opposition to the motion to dismiss or for summary judgment. The plaintiff did not obey either the rule or the Order.

The Third Circuit has applied the same general analysis, using some or all of the six part test enunciated in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984), in reviewing all orders which deprive a party of the right to proceed with or defend a claim. *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1148 (3d Cir. 1990). The *Poulis* factors the court should consider are:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id.

The plaintiff's dilatoriness outweighs any of the other considerations set forth in *Poulis*. The plaintiff's failure to comply with the Order of June 10, 2009, indicates that the plaintiff has abandoned this lawsuit.

Based on the foregoing, it is recommended that the action be dismissed pursuant to Fed.R.Civ.P.41(b) for the plaintiff's failure to obey Local Rule 7.6 and the Order of June 10, 2009.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

Dated: July 22, 2009.